In the

Supreme Court of the United States

OCTOBER TERM, 1978

---

NO. 78-58

---

G. GARVIN BROWN, III,

*Petitioner,*

v.

MARK PAUL FELSEN,

*Respondent.*

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

---

**BRIEF FOR THE RESPONDENT**

---

ALEX STEPHEN KELLER
Keller, Dunievitz & Johnson
950 - 17th Street, #1650
Denver, Colorado 80202
(303) 571-5302
COUNSEL FOR RESPONDENT

January 8, 1979

## INDEX


| | Page |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATUTES INVOLVED | 1 |
| QUESTIONS PRESENTED | 2 |
| STATEMENT OF THE CASE | 2 |
| SUMMARY OF ARGUMENT | 2 |
| ARGUMENT | 3 |
| A CREDITOR WHO HAS NOT PLEADED FRAUD IN A STATE COURT PROCEEDING AND ENTERS INTO A STIPULATION AND CONSENTS TO A JUDGMENT BASED ON CONTRACT, IS NOT ENTITLED TO A FULL TRIAL IN THE BANKRUPTCY COURT IN ALL CASES | 3 |
| CONCLUSION | 9 |

## CITATIONS


| | Page |
|---|---|
| **CASES:** | |
| *In re Houtman,* 568 F. 2d 651 (9th Cir. 1978) | 6 |
| *In re McMillan,* 579 F. 2d 289 (3rd Cir. 1978) | 7 |
| *In re Nadler,* 424 F.S. 1106 (Mo. 1976) | 6 |
| *In re Nicholas,* 510 F. 2d 160 (10th Cir.) cert. denied 421 U.S. 1012 (1975) | 2, 3, 4, 6, 9 |
| *In re Pigge,* 539 F. 2d 369 (4th Cir. 1976) | 2, 4 |
| *Morrison v. Goodspeed, et al.,* 100 Colo. 470, 68 P. 2d 458 (1937) | 5 |
| *U.S. v. Armour & Co.,* 402 U.S. 673 (1971) | 7 |
| *U.S. v. Swift & Co.,* 286 U.S. 106 (1932) | 8 |
| **MISCELLANEOUS:** | |
| 46 Am. Jur. 2d 837, Judgments §686 | 7 |
| Rule 9(b), Colorado Rules of Civil Procedure | 5 |
| Moore's Fed. Practice, 2d Ed., Vol. 7, §60.19 | 8 |
| 11 U.S.C. §35 | 2 |


In the

Supreme Court of the United States

OCTOBER TERM, 1978

---

NO. 78-58

---

G. GARVIN BROWN, III,

*Petitioner,*

v.

MARK PAUL FELSEN,

*Respondent.*

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

---

## BRIEF FOR THE RESPONDENT

---

### OPINIONS BELOW

The Opinions Below, as set forth in the Appendix, are accurate.

### JURISDICTION

Jurisdiction is admitted.

### STATUTES INVOLVED

The statutes cited by petitioner are the applicable statutes.

## QUESTION PRESENTED

Whether a creditor who did not raise fraud in the State Court proceedings and raises it for the first time in the Bankruptcy Court is, in all cases, entitled to a complete trial in the Bankruptcy Court when the State Court judgment is by consent based on contract only.

## STATEMENT OF THE CASE

The Statement of the Case of petitioner is accurate.

## SUMMARY OF ARGUMENT

There is no dispute that the applicable statute vested exclusive jurisdiction in the Bankruptcy Court to determine dischargeability. In the case at Bar the Bankruptcy Court determined that the debt was dischargeable, relying on *In re Nicholas,* 510 F. 2d 160 (10th Cir.) *cert. denied,* 421 U.S. 1012 (1975). Petitioner in the case at Bar relies on *In re Pigge,* 539 F. 2d 369 (4th Cir. 1976). The two cases from two different circuits reach contrary conclusions.

Petitioner speculates as to the reasons for the 1970 amendments to 11 U.S.C. §35. Whether the reasons for the amendments are as petitioner states is immaterial. The issue is, what is the effect of the amendments? The obvious effect is to vest jurisdiction to determine dischargeability in the Bankruptcy Court, nothing more and nothing less. The amendments do not eliminate the doctrines of res judicata, estoppel, waiver, collateral estoppel or the rules of pleading, as petitioner contends.

Petitioner argues that creditors are forced to raise superfluous issues in the state courts, thus tying up the state court's time with issues which will never become relevant. The other side of the same argument is that, under petitioner's theory, bankruptcy courts would be tied up in trial on matters long since fully resolved in the state courts and would permit creditors, as an afterthought, to raise fraud



for the first time in the bankruptcy court in a last ditch effort to collect debts from people with no money.

There is no reason why a creditor with a bona fide fraud case would not proceed in the state court to prove it. Fraud has consequences other than non-dischargeability, such as punitive damages and body execution. Surely by the time a state court case comes to trial, the creditor knows whether the debtor has assets or not, and if the debtor has little or no assets, the creditor must contemplate the possibility of a bankruptcy petition.

Petitioner argues that as the result of the Tenth Circuit's rule, dischargeability is determined by the state courts, but this is carrying the rule in the Tenth Circuit far beyond *In re Nicholas, supra,* and reduces the rule to the ridiculous. Of course state courts have declined to rule on dischargeability in bankruptcy. They have no jurisdiction to make such determination, but are perfectly capable of determining fraud.

## ARGUMENT

### A CREDITOR WHO HAS NOT PLEADED FRAUD IN A STATE COURT PROCEEDING AND ENTERS INTO A STIPULATION AND CONSENTS TO A JUDGMENT BASED ON CONTRACT, IS NOT ENTITLED TO A FULL TRIAL IN THE BANKRUPTCY COURT IN ALL CASES.

In order to place this issue in its proper perspective, one must first examine *In re Nicholas, supra.* A unanimous panel of the Tenth Circuit was faced with a judgment in New Mexico for breach of contract. Fraud had not been pleaded. The debtor filed a petition in bankruptcy, scheduled the judgment, and the creditor filed a complaint in the Bankruptcy Court seeking to prevent discharge of the State Court judgment. The bankrupt filed a motion for summary judgment attaching a certified copy of the State Court pro-

ceedings. The trial court held that there was no need to resort to extrinsic evidence to ascertain the true nature of the underlying debt but stated that if there were ambiguity or doubt as to the state court proceeding, resort could be had to extrinsic matters.

Mindful of the 1970 amendments, the Tenth Circuit held that the substantive law had not been changed by the amendments. When the entire state court record, not just the judgment, is before the court and based on contract, extrinsic evidence is unnecessary.

The case clearly holds that the jurisdiction to determine dischargeability rests with the bankruptcy court, but delineates what the bankruptcy court can or cannot consider in making its determination. Nothing in the 1970 amendments indicates that the rules of evidence and other procedural rules are intended to be changed; neither are the rules of res judicata, waiver, estoppel or pleading.

*In re Pigge, supra,* holds to the contrary and goes far beyond what the 1970 amendments require. The amendments seek to establish uniformity in the determination of dischargeability of debts by vesting jurisdiction in the federal court system, but that is all. They do not guarantee a creditor to a trial in the federal court system on an issue which is a pure afterthought following complete resolution of the matter in the state courts.

When petitioner argues on page 9 of the brief that *In re Nicholas, supra,* ignores the express language and purpose of the 1970 amendments, we fail to find language in the amendments to sustain petitioner's position.

On the same page of petitioner's brief, the rule of the Tenth Circuit is criticized with a comment that a creditor must pursue his fraud claim in the state courts. This is not the case. If a creditor seeks to preserve a fraud claim in the state courts he could, for example, while accepting a con-



sent judgment or default judgment on contract, request and obtain from the state court a specific ruling that while fraud has been pleaded, it is not necessary for the state court to decide that issue, and in the event of bankruptcy the matter is reserved for the bankruptcy court.

The creditor could also specifically ask that the judgment recite that fraud claims are not waived. Also, the creditor could maintain the fraud claim on the state court's trial docket as unresolved. In all events, the creditor should do something if he is serious about his fraud claim, and the first thing he should do is plead it. In no way does the Tenth Circuit's rule transfer the determination of bankruptcy discharge to the state courts.

In the case at Bar, the only reference to fraud appears in petitioner's amended answer (A. 35) keeping in mind that there were two other defendants, only one of whom filed bankruptcy. Paragraph 3 of petitioner's affirmative defenses is unclear as to who committed the alleged fraud.

In order to properly evaluate the sufficiency of this pleading, one must look to Colorado law. Rule 9(b), Colorado Rules of Civil Procedure, provides as follows:

> "(b) *Fraud, Mistake, Condition of the Mind.* In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

The leading case in Colorado as to the requirements for pleading and proving of fraud is *Morrison v. Goodspeed, et al.,* 100 Colo. 470, 68 P. 2d 458. At 68 P. 2d 462, the Colorado Supreme Court set forth the following elements:

> "The constituents of fraud, though manifesting themselves in a multitude of forms, are so well recognized that they may be said to be elementary. They consist of the following: (1) A false representation of

a material existing fact, or a representation as to a material existing fact made with a reckless disregard of its truth or falsity; or a concealment of a material existing fact, that in equity and good conscience should be disclosed. (2) Knowledge on the part of the one making the representation that it is false; or utter indifference to its truth or falsity; or knowledge that he is concealing a material fact that in equity and good conscience he should disclose. (3) Ignorance on the part of the one to whom representations are made or from whom such fact is concealed, of the falsity of the representation or of the existence of the fact concealed. (4) The representation of concealment made or practiced with the intention that it shall be acted upon. (5) Action on the representation or concealment resulting in damage. Wheeler v. Dunn, 13 Colo. 428, 22 P. 287."

It is for this reason that the Tenth Circuit in the case at Bar found that petitioner's answer does not adequately raise the issue of fraud (A. 54).

A situation in which the creditor properly pleaded fraud and obtained a consent judgment based on fraud was discussed in *In re Nadler,* 424 F.S. 1106, a 1976 decision by the U. S. District Court for the Eastern District of Missouri. In that case the bankrupts attempted to go behind the state court judgment, which was based on fraud, and to which they consented. The District Court refused to permit this, relying in part on *In re Nicholas, supra.*

Petitioner relies heavily on *In re Houtman,* 568 F. 2d 651 (9th Cir. 1978). In that case the 9th Circuit held that a state court judgment, based on fraud, is sufficient to establish a prima facie case that the debt is non-dischargeable. We do not believe the case supports petitioner's position because there the creditor fully pursued his fraud claim in the state court.



Petitioner also relies on *In re McMillan,* 579 F. 2d 289 (3rd Cir. 1978), Respondent believes this case supports his position. In that case the creditor filed a complaint based on fraud in the State Court and obtained a judgment by default. The Bankruptcy Court, asked to rely on the State Court judgment, ruled the debt dischargeable. The District Court affirmed. The Third Circuit affirmed. In the opinion it is stated that the creditor did not adequately plead fraud. The Court further stated that as between parties and their privies an issue need and should be judicially determined only once. The Court relied heavily on the fact that in a default judgment the issue was not actually litigated and thus the doctrine of *res judicata* or collateral estoppel does not come into full play. The Court undoubtedly had in mind the fact that judgments by default are subject to different rules than other judgments. They are liberally opened, corrected or vacated, and discretion is usually exercised in favor of granting such applications. These rules are fundamental and are generally discussed at 46 Am. Jur. 2d 837. Judgments, §686.

It is interesting to note that in the opinion in the case at Bar, the Tenth Circuit is mindful of the distinction between a consent decree and a default judgment (A. 53, 54). The Court refers to *U. S. v. Armour & Co.,* 402 U.S. 673 (1971). Justice Marshall said in this case:

> "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the *decree* itself cannot be

said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation."

In the case at Bar, petitioner waived his right to litigate fraud.

An older case is *U.S. v. Swift & Co.,* 286 U.S. 106 (1932). In referring to a consent decree, Justice Cardozo said:

"The result is all one whether the decree has been entered after litigation or by consent."

The distinction between a judgment by default and a judgment by consent is carefully analyzed in Moore's Federal Practice, Second Edition, Vol. 7, §60.19. On pages 232, 233, referring to default judgments, it is stated:

"Where timely relief is sought from a default judgment and the movant has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits."

In referring to consent judgments, on pages 239, 240, it is stated:

"In general, a party will not be granted relief from a consent judgment; but the facts and circumstances



of a particular case may, however, warrant relief therefrom."

Notably, in petitioner's brief, on page 11, petitioner is not mindful of this distinction and refers to default judgment or stipulated judgments as the same thing. Since *In re Nicholas,* supra, was based on a default judgment, the case at Bar is substantially stronger than *In re Nicholas,* supra.

It has generally been the policy of the law to discourage multiple suits on the same issues between the same parties. It has also been generally the policy under the bankruptcy statutes to give people a fresh start and be free of their debts. The law generally does not favor afterthoughts and the taking of inconsistent positions. All of these broad generalities mitigate against the petitioner in this case who conducted litigation from June 1975 until December 1975 in the state court, at which time a consent judgment was entered in paragraph 1 on plaintiff's complaint and in paragraph 2 on Brown's cross-claim (A. 42), with no reference at all to the affirmative defense here relied on by petitioner. As a matter of policy and common sense, this creditor should not be permitted to raise a new issue as if the state court case never existed.

## CONCLUSION

The judgment of the Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

ALEX STEPHEN KELLER
Keller, Dunievitz & Johnson
950 - 17th Street, #1650
Denver, Colorado 80202
(303) 571-5302
COUNSEL FOR RESPONDENT

January 8, 1979